

**Before the
Federal Communications Commission
Washington, D.C.**

In the matter of

Implementation of Section 210)	
of the Satellite Home View)	
Extension and Reauthorization Act)	MB Docket No. 05-181
of 2004 to Amend Section 338 of the)	
Communications Act)	
)	

To: Secretary

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

1. Eastern Television Corporation, Encuentro Christian Network Corp., International Broadcasting Corporation, and R y F Broadcasting, Inc. (jointly referred to as “Petitioners”) by their counsel and in accordance with Section 1.429 of the rules and regulations of the Federal Communications Commission hereby submit this *Reply to the Oppositions to the Petition for Reconsideration to the Report and Order*¹ in the above mentioned docket. Petitioners have requested reconsideration of the portion of the *Report and Order* that adopts rules excluding Puerto Rico from the meaning of “State” as referred to in the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”).²

¹ Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act, *Report and Order*, FCC 05-159, (August 23, 2005) [hereinafter *Report and Order*].

² The Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), Pub. L. No. 108-447, § 210, 118 Stat 2809 (2004) [hereinafter *SHVERA*].

I. Contextual Arguments Garner Little Weight

2. EchoStar Satellite LLC (“EchoStar”) and DirecTV Inc. (“DirecTV”) separately submitted an *Opposition to Petition for Reconsideration* (referred to individually as the “*Opposition Petition*” or jointly as the “*Opposition Petitions*”). The chief argument in each *Opposition Petition* was that the Commission correctly determined that “State”, as referred to in SHVERA, only includes Alaska and Hawaii.³ To support this contention, the *Opposition Petitions* purport that it is not technically feasible to serve all the Territories and Possessions, therefore, Congress could not have mandated a must carry obligation that was not feasible.⁴

3. This position is undermined by the fact that Congress has mandated on several occasions legislation that presents “serious technical difficulties”⁵ for its constituents.⁶ It also appears that any regulation placed on direct broadcast satellite (“DBS”) providers presents “serious . . . operational issues.”⁷ In their own comments and petitions for reconsiderations in

³ Report and Order, *supra* note 1 at para. 9. *See also*, SHVERA, *supra* note 2 at § 210.

⁴ *See Opposition to Petition for Reconsideration* of the EchoStar LLC, FCC 05-159 (Aug. 23, 2005)[hereinafter *EchoStar Opposition Petition*] at 2-3. *See Opposition to Petition for Reconsideration* of the DirecTV Inc., FCC 05-159 (Aug. 23, 2005)[hereinafter *DirecTV Opposition Petition*] at 2-5.

⁵ Report and Order, *supra* note 1 at para. 9.

⁶ Included herein are examples (not exhaustive just illustrative) of legislative mandates that presented serious technical difficulties to fully implement. *See, e.g.*, Communications Assistance for Law Enforcement Act of 1994 (CALEA), Pub. L. No. 103-414, 108 Stat. 4279; Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286, § 2(b) (1999); Satellite Home Viewer Improvement Act of 1999 (“SHVIA”), Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 (“IPACORA”), PL 106-113, 113 Stat. 1501; and Hearing Aide Compatibility Act of 1988, 100 P.L. 394; 102 Stat. 976.

⁷ *Petition for Partial Reconsideration* of the EchoStar LLC, FCC 05-159 (Aug. 23, 2005)[hereinafter *EchoStar Reconsideration Petition*] at 11. *Comments* of the DirecTV, Inc., FCC 05-159 (Aug. 23, 2005)[hereinafter *DirecTV Comments*] at 10.

this proceeding, both DirecTV and EchoStar claim that providing service to Alaska and Hawaii present “extraordinary technical challenges.”⁸ They also request reconsideration on the Commission’s mandate that they must provide both high-definition and multicast signals in Alaska and Hawaii because “the burdens . . . are substantial”⁹ These “cry wolf” arguments lose their legitimacy when they are used *ad nauseam*. If the Commission parsed off all legislative mandates that were “technically not feasible” according to the DBS providers, our satellite laws would become completely hollow. It is hardly rare for Congress to mandate laws that are technically difficult to implement. Therefore, the context that a legislative mandate would pose “serious . . . operational issues”¹⁰ should be given little weight because Congress imposes technically difficult burdens on a regular basis and the DBS providers claim almost every technical mandate creates “extraordinary technical challenges.”¹¹

4. In light of the unreliability of DirecTV’s and EchoStar’s contextual arguments, the Commission must use a plain statutory interpretation of the term “State” to include all of the Territories and Possessions of the United States, including Puerto Rico. If Congress intended to exclude the Territories and Possessions, Congress would have limited the scope of the statute by simply stating that SHVERA only applies to Hawaii and Alaska. Instead, Congress expressed

⁸ *Petition for Partial Reconsideration* of the DirecTV, Inc., FCC 05-159 (Aug. 23, 2005)[hereinafter *DirecTV Reconsideration Petition*] at i. DirecTV Comments, *supra* note 7 at 3. Comments of the EchoStar LLC, FCC 05-159 (Aug. 23, 2005) at 2.

⁹ EchoStar Reconsideration Petition, *supra* note 7 at 11. *See also*, DirecTV Reconsideration Petition, *supra* note 8 at 5. Notably, just as they do in Puerto Rico, DirecTV and EchoStar both provide local-into-local service in Hawaii and Alaska.

¹⁰ DirecTV Comments, *supra* note 7 at 10.

¹¹ Report and Order, *supra* note 1 at para. 9.

the broader meaning of “State” by including the phrase, “a State that is not part of the contiguous United States.”¹²

II. Feasibility not an Issue in Puerto Rico

5. Irregardless of whether it is technical feasible for DirecTV and EchoStar to provide local-into-local in all U.S. Territories and Possessions, they have proven that it is feasible to provide local-into-local in Puerto Rico because both EchoStar and DirecTV carry local Puerto Rican television stations – and they were doing so when SHVERA was enacted.¹³ If the DBS providers’ arguments are accepted, then the congressional intent of the definition of “State” only included those noncontiguous States, including Territories and Possessions that the DBS providers could serve, which includes Puerto Rico but excludes all other Territories and Possessions that DBS providers cannot serve because it is technically infeasible.

III. Section 338 Applies to DirecTV Latin America, LLC

6. DirecTV states that it has not acknowledged that it carries Puerto Rican stations;¹⁴ however, DirecTV’s affiliate, DirecTV Latin America, LLC, does. Simply put, DirecTV is playing semantics and hiding behind a corporate veil in an attempt to avoid regulation. DirecTV Group, Inc. owns 85.9% of DirecTV Latin America, LLC and owns 100% of DirecTV Enterprises, LLC; DirecTV’s United States spectrum is licensed to DirecTV Enterprises, LLC.¹⁵ As far as we have been able to determine, DirecTV and DirecTV Latin America, LLC both rely on the spectrum licensed to DirecTV Enterprises, LLC to provide their DBS services. If this is

¹² SHVERA, *supra* note 2 at § 210 (emphasis added).

¹³ EchoStar and DirecTV Latin America, LLC service in Puerto Rico includes the following local stations: WSJU-TV, WKAQ-TV, WIPR-TV, WAPA-TV and WLII.

¹⁴ DirecTV Opposition Petition, *supra* note 4, at note 21.

¹⁵ See Exhibit 1 attached hereto for a description and diagram of DirecTV’s corporate structure.

so, DirecTV's claim that DirecTV Latin America should not be subject to the same rules, regulations, and carriage requirements as DirecTV simply because they are affiliates is wholly without merit.¹⁶ If the Commission were to follow DirecTV's logic, its multiple ownership rules would be rendered meaningless by the mere creation of a parent with separate subsidiaries, each of who would claim they are not subject to the same rules because they are separate entities.

7. DirecTV makes an unsupported assumption that Section 338(a)(4) does not apply to DirecTV Latin America, LLC because Section 338 does not state "a satellite carrier and its affiliates."¹⁷ Section 338(a)(4) does state that these obligations apply to "satellite carriers . . . in the United States" Puerto Rico and all the other Territories and Possessions are part of the United States – this is an undisputable fact.¹⁸ Furthermore, a careful reading of the statute shows that a "satellite carrier" is defined as "an entity that uses facilities of a satellite or satellite service licensed by the Federal Communications Commission"¹⁹ DirecTV's affiliate, DirecTV Latin America, necessarily "uses facilities of a satellite or satellite service licensed by the Federal Communications Commission" to provide its DBS service to Puerto Rico, so DirecTV Latin America is a "satellite carrier," and any claim that it is not would be ludicrous. DirecTV, its parent company, and its affiliates must not be able to hide behind a corporate veil to avoid statutory mandates from Congress to carry all local, non-duplicative stations that provide a good

¹⁶ It should also be noted that DirecTV's Latin American customers receive a wide array of programming from the United States.

¹⁷ DirecTV Opposition Petition, *supra* note 4, at note 21.

¹⁸ *See*, Jones-Shafroth Act of 1917, Pub. L. No. 64-368, 39 Stat. 951 (granting Puerto Ricans American citizenship and Puerto Rico became an unincorporated territory of the United States)

¹⁹ 17 U.S.C. § 119(d)(6).

quality signal to the carrier's local receive facility wherever the carrier provides local-into-local service, as do DirecTV and EchoStar in Puerto Rico.

IV. Puerto Rico is a DMA

8. While it has been found that the Commission does not have the authority to modify the shape of designated market areas ("DMA"), the Commission may create DMAs.²⁰ Nowhere in Section 122 does it state that the Commission shall not create DMAs. In order to prevent unfair implementation of Congressional mandates and its own rules, the Commission may need to create DMAs, as it has done for Puerto Rico in the cable, multiple ownership, and the multichannel video distribution and data service ("MVDDS") service area rules.²¹ Congress, in enacting SHVERA and Satellite Home Viewer Improvement act of 1999 ("SHVIA"),²² sought to create parity between cable and satellite regulations.²³ Should the Commission rule in favor of the DBS providers and not consider Puerto Rico as a DMA in the satellite rules but consider it a DMA in the cable rules, this ruling would not fulfill the parity that Congress sought to obtain.

²⁰ In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues, *Report and Order*, 16 Rcd 1918 para. 40-41 (2000).

²¹ 47 CFR § 76.55(e). 47 CFR § 73.35555. 47 CFR § 101.1401. Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures, *Public Notice*, 18 FCC Rcd 17553 (2003). Auction of Multichannel Video Distribution and Data Service Licenses Rescheduled for June 25, 2003, *Public Notice*, 18 FCC Rcd 1105 (2003).

²² Satellite Home Viewer Improvement Act of 1999, Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, PL 106-113, 113 Stat. 1501.

²³ H.R. REP. NO. 108-634, at 2, 3, 5, 11 (2004) (stating that, "[t]he purpose of H.R. 4501, the 'Satellite Home Viewer Extension and Reauthorization Act of 2004' (SHVERA), is to modernize satellite television policy and enhance competition between satellite and cable operators. The bill does so by . . . *increasing regulatory parity* by extending to satellite operators the same type of authority cable operators already have to carry . . . local broadcast signals" (emphasis added)). S. REP. NO. 108-427, at 1-2 (2004).

Classifying Puerto Rico as its own DMA in some rules and not in others creates an inconsistency and arbitrariness in the rules that will lead to inequity.²⁴

V. SHVERA Does not Violate First Amendment

9. Finally, DirecTV and EchoStar caution the Commission that “unduly burdening satellite carriers” could infringe upon their First Amendment rights.²⁵ That argument holds no sway, either here or in the courts. Relying heavily on the Turner I²⁶, a federal district court in 2001 ruled that SHVIA did not violate the First Amendment.²⁷ The court determined that SHVIA survived intermediate scrutiny because the law was not content-based and sought to preserve “free, over-the-air local broadcast television, . . . promot[e] the widespread dissemination of information from a multiplicity of sources, and . . . promot[e] fair competition in the market for television programming.”²⁸ These rationales survive today giving DirecTV and EchoStar no constitutional ground on which to stand.

VI. Conclusion

10. Petitioners request reconsideration of the Commission’s *Report and Order* as it pertains to the definition of “State.” A plain statutory interpretation of the meaning of “State” includes all Territories and Possessions, including Puerto Rico where both DirecTV and EchoStar already provide local-into-local service – a fact that we have proved and neither of

²⁴ Importantly, The Television & Cable FactBook 2005 lists all Puerto Rican TV stations as separate DMAs. WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK VOLUME 73, A-2380-A2405 (2005).

²⁵ EchoStar Opposition Petition, *supra* note 4 at 4-5. DirecTV Reconsideration Petition, *supra* note 8 at 9-15.

²⁶ Turner Broad. Sys. V. F.C.C. (Turner I), 512 U.S. 622 (1994).

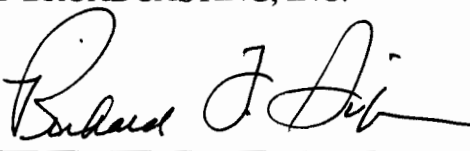
²⁷ Satellite Broad. & Communications Ass’n of America v. F.C.C., 146 F. Supp. 2d 803 (2001).

²⁸ *Id* at 826 (quoting Turner I).

them have denied. The Commission's argument that it is technically impossible to provide service to all the Territories and Possessions provides little contextual weight given that most regulations on DBS providers present "extraordinary technical challenges" and the fact that Congress often mandates technically difficult laws to implement. Because the Commission treats Puerto Rico as a single market DMA for cable, multiple ownership and MVDDS rules, it must not capriciously change that determination for application of the DBS rules. SHVIA has passed constitutional muster, therefore, SHVERA stands on strong constitutional footing. For the reasons above we submit this Reply and respectfully request that the Commission order DirecTV and EchoStar to begin carrying all local television stations in Puerto Rico, under the same rules and regulations that govern the DBS carriage of television stations in the States of Alaska and Hawaii.

Respectfully submitted,

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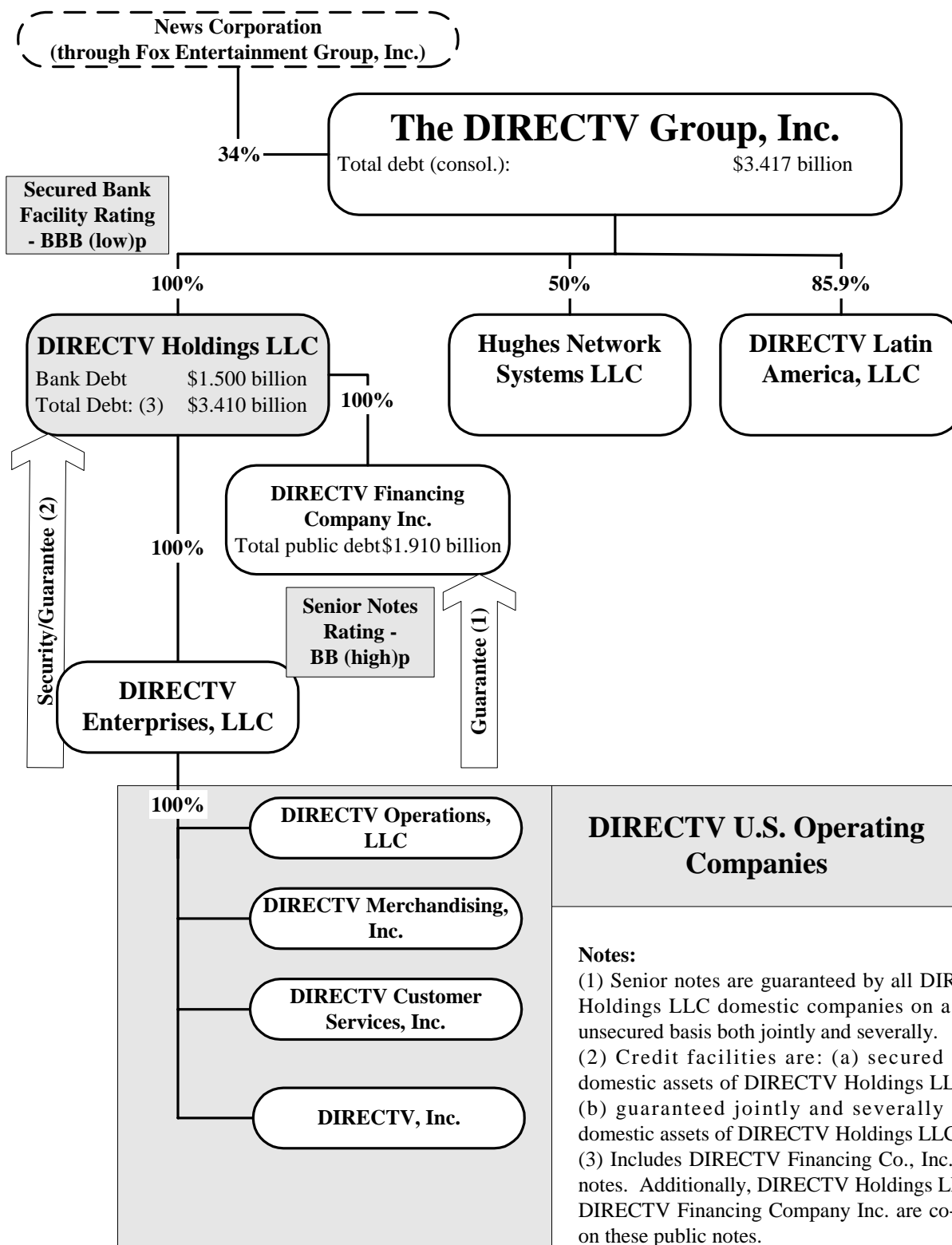
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Exhibit 1
Corporate Structure of DirecTV Group, Inc.*

* DOMINION BOND RATING SERVICE, Credit Rating Report (November 17, 2005), at <http://www.dbrs.com/intnlweb/document?docId=204900&source=website&returnResultType=HomePage>.

CORPORATE STRUCTURE

**Commentary:**

- The Company's credit facilities, BBB (low)p, are rated one level higher than the Senior Notes, BB (high)p, because they are secured credit agreements.
- DIRECTV Group (parent) has the ability to redirect cash flow from DIRECTV to its other entities.

Certificate of Service

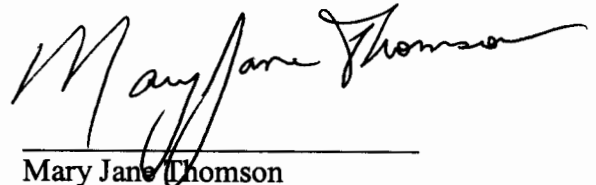
I, Mary Jane Thomson, hereby certify that on this 19th day of December, 2005, true and correct copies of the foregoing "Reply to Oppositions to Petition for Reconsideration" have been served first class U.S. mail to the following:

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